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No. 99-598

In the

Supreme Court of the United States

THE PACIFIC LUMBER COMPANY, a Delaware Corporation; SCOTIA PACIFIC HOLDING COMPANY, a Delaware Corporation; SALMON CREEK CORPORATION, a Delaware Corporation,
Petitioners,

v.

MARBLED MURRELET (*Brachyramphus marmoratus*); NORTHERN SPOTTED OWL (*Strix occidentals caurina*); ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether the neutrally worded fee-shifting provision of the federal Endangered Species Act, 16 U.S.C. § 1540(g)(4), providing for a discretionary award of reasonable attorney and expert witness fees to "any party, whenever the court determines such award is appropriate" is to be governed by the dual standard favoring civil rights plaintiffs of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), or by the evenhanded rule found applicable to neutrally worded fee-shifting statutes in *Fogerty v. Fantasy Records, Inc.*, 510 U.S. 517 (1994).

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached brief amicus curiae and brief amicus curiae in support of the petition for writ of certiorari.[1] Written consent for amicus participation in this case was granted by counsel for Pacific Lumber and has been lodged with the Clerk of the Court. Counsel for Respondents Marbled Murrelet, Northern Spotted Owl, and Environmental Protection Information Center has not yet consented, necessitating this motion.

Pacific Legal Foundation is the largest and most experienced nonprofit, tax-exempt public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington; Miami, Florida; Honolulu, Hawaii; and a liaison office in Anchorage, Alaska.

PLF actively engages in research and litigation over a broad spectrum of public interest issues nationwide. PLF advocates a balanced approach in dealing with public interest issues and supports the concept that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved. PLF especially stresses this approach in the area of land use and environmental legislation.

PLF devotes substantial resources to litigation and administrative proceedings involving environmental issues in

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

general, and the Endangered Species Act in particular. PLF has participated in numerous cases involving the correct interpretation of environmental statutes including the Endangered Species Act. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981); participated as Amicus Curiae before the United States Supreme Court in *Bennett v. Spear*, 520 U.S. 154 (1997), and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and before the Court of Appeals for the District of Columbia Circuit in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), and *Building Industry Association v. Babbitt*, No. 97-5255 (D.C. Cir. 1997); and PLF attorneys served as lead counsel in *Fairy Shrimp Study Group v. Babbitt*, No. 1:97CV02481 (D.D.C. 1998), which was successfully settled on October 26, 1999.

Amicus has examined the opinion of the Ninth Circuit Court of Appeals and is familiar with the questions involved in the litigation and the scope of the presentation. Amicus believes that further argument would be of assistance to the Court. Amicus would focus its presentation mainly on the legal principles and policy interests behind Congress' inclusion of citizen suit provisions in environmental statutes.

PLF is concerned about the proper interpretation of the Endangered Species Act and seeks to supplement Petitioners' argument by illustrating the goals that Congress sought to accomplish with citizen suit provisions in environmental statutes and how prevailing defendants, such as the Petitioners in this case, further those goals in their successful defense under the Endangered Species Act, warranting an award of attorneys' fees. In conjunction with the general goal of promoting species conservation, Congress also seeks with the Endangered Species Act to promote efficient administration of the Act's conservation goals and to mitigate the economic consequences of enforcement of the Act.

Petitioners as prevailing defendants advanced both of these concerns. However, environmental advocates file the overwhelming majority of citizen suits and, due to disincentives to vigorous defenses, have been able to direct the interpretation and implementation of environmental statutes away from the balanced goals Congress envisioned. The result is environmental statutes that emphasize species conservation with little concern for economic and administrative efficiency. The fact that plaintiffs possess the incentive of routine fee awards, in addition to the usual ideological incentives, facilitates the imbalance in the interpretation of those statutes. In order to restore the needed balance and achieve all the goals that citizen suits serve, incentives must also exist for defendants to litigate because, without any incentive, defendants may too often refuse to vigorously defend their actions and simply settle in order to avoid the expense of litigation.

PLF's public interest perspective, as well as PLF's litigation experience, will provide an additional and necessary perspective on the important issues in this case. For these reasons, PLF respectfully requests that this Court grant its motion for leave to file the attached brief amicus curiae.

DATED: December, 1999.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae Pacific Legal Foundation is set forth in the preceding motion.

STATEMENT OF THE CASE

The case below raised a fundamental question of fairness in the interpretation of the attorney fee provision of the Endangered Species Act. When a private party successfully defends its actions in court and, in doing so, promotes species conservation and the efficient administration of the Endangered Species Act, does the Endangered Species Act allow, and does that party deserve, an award of attorneys' fees?

Pacific Lumber manages timber resources in Northern California, including harvesting trees in need of salvage and also seeking to fill the public's need for healthy trees. Pacific Lumber bestows upon California economic benefits while utilizing renewable forests to provide lumber for purposes such as housing. When Pacific Lumber attempted to harvest the lumber on its private land, including thinning out dead, dying, and diseased trees, Respondents Environmental Protection Information Center (EPIC) twice sued to stop Pacific Lumber from using the land it owns. The Ninth Circuit Court of Appeals vacated the injunction in both cases, deciding for the first time that the Fish and Wildlife Service does not engage in agency action when providing advice that a private party voluntarily seeks, *Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996) (*Murrelet I*). The court also ruled that EPIC failed to raise a serious question regarding whether Fish and Wildlife Service's conduct constituted agency action. *Marbled Murrelet v. Babbitt*, 111 F.3d 1447, 1449-50 (9th Cir. 1997) (*Murrelet II*).

Relying on the Ninth Circuit's ruling that Pacific Lumber promoted species conservation and prevented the imposition of burdensome administrative tasks upon Fish and Wildlife Service, Pacific Lumber petitioned the district court for attorneys' fees pursuant to 16 U.S.C. § 1540(g)(4) of the Endangered Species

Act. *See Murrelet I*, 83 F.3d at 1075. However, the district court denied the request, concluding that Pacific Lumber sought only to cut down its trees.

On appeal, the Ninth Circuit affirmed the district court, rejecting its own standard previously set forth in *Carson-Truckee Water Conservancy District v. Secretary of the Interior*, 748 F.2d 523 (9th Cir. 1984), *cert. denied*, *Pyramid Lake Paiute Tribe v. Carson-Truckee Water Conservancy District*, 471 U.S. 1065 (1985). In *Carson-Truckee*, the court held that a prevailing defendant need only "substantially contribute" to the goals of the environmental statute to qualify for attorneys' fees. But in this case the court held that the double standard applicable to civil rights claims would henceforth be applied to prevailing defendants in environmental cases even when the statute authorizes an award of attorneys' fees "to any party, whenever . . . appropriate." *See Christiansburg Garment Company v. EEOC*, 434 U.S. 412 (1978); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (9th Cir. 1999). Notwithstanding the neutral-wording of the fee-shifting provision, under this standard a prevailing defendant may receive attorneys' fees only if the underlying lawsuit is unreasonable, frivolous, meritless, or vexatious.

SUMMARY OF ARGUMENT

This petition involves interpretation of the Endangered Species Act attorney fee provision which states:

> The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

16 U.S.C. § 1540(g)(4). However, at issue in this case is not only the plain meaning of the citizen suit provision of the Endangered Species Act, but also the important policy interests behind citizen suit provisions in environmental statutes. The importance of these policy interests is apparent in light of the increasing number of

environmental citizen suits filed in recent years and the way in which these suits shape environmental laws and public conduct.

The Endangered Species Act provides that "any party" may obtain fees "whenever . . . appropriate." 16 U.S.C. § 1540(g)(4). Neither the Endangered Species Act nor its legislative history defines the term "whenever . . . appropriate." Instead, the "substantial contribution" standard has been relied upon to define the term because this Court, as well as the Courts of Appeals for the Fifth Circuit and the District of Columbia, and formerly the Ninth Circuit, all apply the standard when determining the appropriateness of a fee award under the Endangered Species Act or the identical provisions in the Clean Air Act and the Clean Water Act. These courts, using the substantial contribution standard, define the term "whenever appropriate" to require only that a party substantially contribute to the goals of the environmental statute involved. They do not distinguish between plaintiffs and defendants.

The Ninth Circuit overturned circuit precedent in this case and held that the Endangered Species Act provides fee awards only to plaintiffs unless the suit is unreasonable, frivolous, vexatious, or meritless, in which case a defendant may recover fees. However, the court's ruling, that a "double standard" applies in awarding attorneys' fees in environmental cases, creates uncertainty and conflict not only among the circuits, but also within the Ninth Circuit itself.

The Endangered Species Act, like most environmental statutes, seeks to accomplish more than one goal. The Endangered Species Act serves not only to conserve species, but also balances species conservation with economic interests and administrative efficiency. These competing goals sometimes conflict. Thus, the Endangered Species Act requires vigorous litigation to define its terms in a balanced and reasoned manner. The number of citizen suits filed has increased substantially and

the effect that these suits have in shaping environmental law is significant.

Environmental advocates file the overwhelming majority of citizen suits and, due to disincentives to vigorous defenses, have been able to slant the interpretation and implementation of the statutes to their favor. The result is environmental statutes that emphasize species conservation with little concern for economic interests and administrative efficiency. The fact that plaintiffs possess the incentive of routine fee awards, in addition to the usual ideological incentives, facilitates an imbalance in the interpretation of those statutes. In order to restore the needed balance and achieve all the goals that citizen suits serve, incentives must also exist for defendants to litigate. Otherwise, without any incentive, defendants may too often refuse to vigorously defend their actions or decide to settle in order to avoid the expense of litigation.

Pacific Lumber illustrates the importance of defendants putting forth a vigorous defense. Pacific Lumber meets the "whenever appropriate" test of the Endangered Species Act because Pacific Lumber demonstrated that its successful defense substantially contributed to the competing goals of the Endangered Species Act. This is the test that should be employed under the Endangered Species Act. The Court should review this case to establish this critical principle.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE CONFLICT AND CONFUSION AMONG THE CIRCUITS

The Ninth Circuit admits that it interprets the attorneys' fees provisions of environmental statutes differently for prevailing defendants than for prevailing plaintiffs. *See Marbled Murrelet v. Babbitt*, 182 F.3d at 1094-95. For example, the Ninth Circuit's

ruling regarding Pacific Lumber's request for attorneys' fees conflicts with its previous ruling in *Carson-Truckee*, which held by implication that a prevailing defendant-intervenor who "substantially contributes" to the Endangered Species Act qualifies for a fee award. Moreover, this most recent Ninth Circuit interpretation of an environmental statute's attorneys' fee provision also conflicts with the Fifth Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals. Both of those circuits apply the substantial contribution standard to the identical provisions of the Clean Water Act and the Clean Air Act with no suggestion of a "double standard." *See Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1176 (5th Cir. 1987); *Florida Power & Light Co. v. Costle*, 683 F.2d 941 (5th Cir. 1982); *Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982); *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982); *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42 (D.C. Cir. 1982).

This Court should grant the writ of certiorari in order to eliminate the confusion between the circuits over the question of when it is appropriate to award citizen suits attorneys' fees under environmental statutes.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF WHETHER ATTORNEYS' FEES SHOULD BE EQUALLY AVAILABLE TO PREVAILING DEFENDANTS AND PREVAILING PLAINTIFFS IN ORDER TO ADVANCE CONGRESS' ENDANGERED SPECIES ACT MANDATE TO CONSERVE SPECIES EFFICIENTLY AND ECONOMICALLY

"It scarcely needs repeating that statutes are rarely, if ever, unidimensionally directed towards achieving or vindicating a single public policy." *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 822 F.2d 104,

113 (D.C. Cir. 1987). Thus, although Congress intended the Endangered Species Act to promote species conservation, Congress tempered that aim by requiring that the economic interests of entities affected by the statute be considered, and the efficient administration of the statute's terms be considered. *See Bennett v. Spear*, 117 S. Ct. 1154, 1168 (1997). However, the Ninth Circuit's decision threatens the balance intended by Congress because it imposes upon defendants a disincentive to litigate vigorously.

In *Bennett*, this Court recognized that Congress placed within the Endangered Species Act protections against haphazard administration and "needless economic dislocation." *Id.* For example, in determining critical habitat, the Endangered Species Act directs the Secretary of the Interior to consider the economic impact of designating habitat and to use only the best scientific data available in making the designation. 16 U.S.C. § 1533(b)(2). Thus, although Congress intended the Endangered Species Act to protect the natural environment as essential to a species' survival, Congress also recognized that it is imperative, due to the profound effect of the Endangered Species Act, to not haphazardly and needlessly set aside habitat and to make those habitat determinations by employing only the best available scientific data. Accordingly, this Court stated in *Bennett*: "We believe the 'best scientific and commercial data' provision is similarly intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations." *Id.*

In addition, this Court noted in *Bennett* that "economic consequences are an explicit concern of the Act," recognizing that Congress allows federal actions to jeopardize endangered species and/or their habitats if no reasonable and prudent alternative exists, if the action's benefits outweigh the benefits of species conservation, or if the action is of regional or national significance. *Bennett*, 117 S. Ct. at 1168; 16 U.S.C. § 1536(h)(1)(A)(i)-(iii). Congress also approves of the "incidental take" of endangered

species when the impact of the "take" is mitigated or minimized. 16 U.S.C. § 1539(a)(2)(A).

Other environmental statutes similarly promote multiple, competing goals. For example, Congress explicitly stated regarding the Clean Air Act that "the purposes of the authorization to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest." H. Rep. No. 294, 95th Cong. 1st Sess. 337, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1416. Congress' intent regarding fee awards applies not only to the Clean Air Act but also the Endangered Species Act. "The legislative history behind most environmental fee-shifting provisions is sparse. Since the legislative history of the fee awards provisions of the Clean Air Act is the most extensive available, courts usually refer to this history even when interpreting the applicable standard in other environmental statutes." Note, *Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 Ga. L. Rev. 307, 327 (1984); *see also Carpenter v. Andrus*, 499 F. Supp. 976, 979 (D. Del. 1980).

Thus, Congress balances competing goals within environmental statutes: environmental protection versus economic interests and administrative efficiency. The above provisions illustrate Congress' recognition that conservation must be balanced with these other interests to the greatest extent possible in order to be most effective. Regarding the Endangered Species Act, efficient administration eases the burden of implementation and allows effective species protection at less cost to the government. Similarly, mitigation of economic impacts eases the burden of compliance and facilitates voluntary public participation in species protection.

The Ninth Circuit's skewed attorneys' fee standard for prevailing defendants threatens to undermine congressional intent and contradicts this Court's understanding of the economic goals

of the Endangered Species Act. Thus, this Court should grant the writ of certiorari to resolve the conflict.

III

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF WHETHER THE NINTH CIRCUIT'S DOUBLE STANDARD FOR ENVIRONMENTAL CITIZEN SUIT ATTORNEYS' FEES DISRUPTS THE BALANCE OF ENVIRONMENTAL LAWS

A. Environmental Organizations Disrupt the Balance of Environmental Statutes by Filing the Vast Majority of Environmental Citizen Suits

Many federal environmental statutes contain a citizen suit provision that allows "any person" to sue private parties for noncompliance with statutory provisions or with standards and regulations issued under the statute. When Congress first included citizen suit provisions in environmental statutes, it expected that citizen suits against alleged polluters would usually be brought by individual "concerned citizens," not by nationally organized environmental advocacy groups. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 351 (1990). However, environmental advocacy groups have filed the vast majority of private enforcement actions. For example, they accounted for roughly two-thirds of enforcement action under the Clean Water Act between 1984 and 1988. *Id.* at 352. Indeed, only five environmental groups filed more than half of the notices of intent to sue during that time. *Id.* at 353.

If citizen suits were not so frequently filed, they might exist only as the safety valve that Congress intended, to allow enforcement when the government is either unwilling or unable to proceed. For example, until 1978, only 25 cases were brought directly against alleged polluters under the Clean Air Act and the Clean Water Act. *See* Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 Denv.

L. J. 553 (1983). Between 1978 and 1981, an average of fewer than five suits per year were filed against private firms under the Clean Water Act. Environmental Law Institute, *Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes*, III-10, 27, 29 (1984).

However, beginning in 1982 the number of citizen suits and notices of intent to sue began to increase dramatically. Greve, *Private Enforcement of Environmental Law* at 352. For example, between January, 1982, and September, 1988, the EPA received 1,020 notices of intent to sue under the Clean Water Act. *Id.* at 352-53. Thus, citizen suits have become more than an occasionally used safety valve. Under some environmental statutes, they seem to have become the dominantly used federal judicial enforcement mechanism. Citizen suits are not a mere occasional device used to spur reluctant agencies into action, nor are they extraordinary remedies for unusual administrative failures. Instead, they have become the means of obtaining a major realignment of roles and powers in important areas of regulation.

Citizen suits invite judicial lawmaking and can place courts in the position of having to define the scope of regulatory requirements. These opportunities for judicial lawmaking, brought most often by environmental advocacy groups, invite inconsistent enforcement and the loss of control over these regulatory programs. As such, their significance can hardly be doubted.

B. Defendants' Lack of Incentives to Vigorously Defend Against Citizen Suits Facilitates the Ability of Environmental Advocacy Groups to Disrupt the Balance of Environmental Laws

With little incentive to litigate, the cost of vigorously defending a lawsuit can be so great that it is most often less expensive to settle early. Not only is the trial itself expensive, but defendants are also subject to attorneys' fees and costs. Thus, accused parties readily pay money to settle disputes rather than

endure long, expensive trials. Environmental organizations recognize this fact, choosing most often to proceed against private industry rather than against government entities. Greve, *The Private Enforcement of Environmental Law* at 362-63. For example, between 1978 and 1984, organized environmental groups brought 162 actions under the Clean Water Act against private industry, but not a single case against a municipal entity. *Id.* at 362. Between 1984 and 1988, they still filed more than six times as many notices of intent to sue against private industry as against governmental entities. *Id.*

This preference for suing private industry cannot be explained by environmental considerations--municipal facilities cause far more water pollution than private industry, and violate their permits far more frequently. *Id.* Instead, the preference is explained by a private corporation's greater capacity for fast decisionmaking. Generally, settlements with private defendants are less complicated and less expensive than negotiations with a government body that worries about the consequences of settlement and accountability to the electorate. *Id.* at 362-63.

These advocacy groups litigate based upon their own agenda and seek to enforce their own interpretations of the law, which are naturally biased toward strict enforcement, at the expense of mitigation and efficiency. When these groups succeed, their interpretations become the law, and case upon case can eventually disrupt the balance of the statutes that Congress intended. When the case precedent moves increasingly toward the viewpoint of environmental advocates, the likelihood of settlement also increases. However, these settlements do not result in increased efficiency. Instead, compliance with environmental laws becomes more costly and less efficient.

Thus, the Ninth Circuit's ruling in this case has disrupted the balance established in the Endangered Species Act by establishing a disincentive for defendants to litigate vigorously while at the same time reenforcing a strong incentive for plaintiffs to strictly

and vigorously prosecute environmental litigation. This Court should grant the writ of certiorari to address the important question of whether an incentive for defendants to vigorously defend against citizen suit litigation will promote the balance that Congress intended in the Act.

IV

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF WHETHER PREVAILING DEFENDANTS SHOULD HAVE AN ATTORNEYS' FEE INCENTIVE TO LITIGATE VIGOROUSLY TO ENSURE THE PROPER BALANCE IN THE LAW

When a defendant charged with violating an environmental law chooses to defend itself and prevails, the result is often a more reasonable interpretation of the environmental statute in which all parties benefit. No one benefits from environmental restrictions at any cost. Congress itself recognized this in attempting to balance various interests by imposing environmental protections within certain frameworks, upon following administrative procedures, and in specific contexts. This equilibrium, however, is achieved most often only when a defendant chooses to vigorously defend itself in court. Unfortunately, a litigation incentive rarely exists for defendants.

A. A Prevailing Defendant Who Promotes Balance and Reason by Substantially Contributing to the Goals of the Statute Earns an Award of Attorneys' Fees

Examples abound in which prevailing defendants have injected balance and reason into the interpretation of environmental statutes. For example, in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1994), the court stated: "The EPA has never acted in any way to suggest that Atlantic States' absolutist and wholly impractical view of the legal effect of a permit is valid." *Id.* at 357. In that case, the court defined the boundaries of the Clean Water Act by

holding that one may discharge substances not listed in a discharge permit without violating the Clean Water Act as long as one complies with existing reporting requirements. *Id.* at 357. Rejecting the environmental plaintiff's argument the court stated: "Atlantic States' view of the regulatory framework stands that scheme on its head." *Id.* The benefit to the general public resulting from the defendant's vigorous defense is found in the court's conclusion that "[c]ompliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit." *Id.* (quoting EPA memorandum).

The *Eastman Kodak* case provides an excellent example of why defendants must be encouraged to defend lawsuits with incentives such as an award of attorneys' fees and costs when they substantially contribute to the goals of an environmental statute. The importance of a prevailing defendant's contribution cannot be understated. One can only imagine the harm that would have been caused if Atlantic States had prevailed in *Eastman Kodak*, given that it "could provide no principled reason why water itself . . . would not be considered a 'pollutant' under its view of the Act." *Id.*

Another good example of the broad public benefit and balance that can result from a vigorous defense is found in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). In analyzing the requirements of the Clean Water Act, the court held that a hydroelectric facility's movement of pollutants already in the water did not constitute an "'addition' of pollutants" requiring a discharge permit. *Id.* at 581. Adhering again to the balanced reasoning of Congress, the court stated that "[h]ad Congress wanted to . . . regulate all sources of pollution, 'it would easily have chosen suitable language.'" *Id.* at 586 (quoting *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982)). Again, one can only imagine the unnecessary burdens that would have been imposed upon the

nation's power producing industry and the costs imposed on the nation's consumers had the extreme position of environmental advocates not been aggressively opposed by the defendants in this case.

Thus, vigorous litigation develops and refines these statutes by interpreting and implementing their terms. Specifically, the Endangered Species Act operates more effectively and efficiently when its parameters and provisions are defined, and its future application becomes more certain. This case is an example of that process because, as the result of a private party defending its actions in court, the Act now provides increased species protection more effectively and efficiently. However, by refusing to recognize Petitioners' contributions to the goals of the Act, the lower court imposes a disincentive to litigate against unreasonable interpretations of the law. This disincentive will not enhance species protection. This case must be reviewed to address the propriety of such disincentives.

B. This Case Provides an Example of a Prevailing Defendant Substantially Contributing to the Goals of the Endangered Species Act by Promoting Species Conservation and Administrative Efficiency

Pacific Lumber set an example in encouraging proactive, voluntary consultation and communication with a federal agency in an effort to avoid "taking" a species. By seeking and obtaining informal Fish and Wildlife Service review and recommendations to ensure that its actions fully complied with the Endangered Species Act, Pacific Lumber facilitated the government's ability to avoid an unnecessary commitment of substantial resources and set a new standard for communication that ensures better compliance with the Act. The Ninth Circuit Court of Appeals recognized Pacific Lumber's contributions in *Murrelet I*, stating:

> Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks

> mandated by section 7 simply because it advised or consulted with a private party.

Murrelet I, 83 F.3d at 1074. Furthermore, the Ninth Circuit illustrated the usefulness of the new rule and the importance of its holding in *Murrelet I* by extending it in *Murrelet II* to cover cases in which Fish and Wildlife Service approval is a prerequisite to state approval. *Murrelet II*, 111 F.3d at 1450.

Agreeing with Pacific Lumber on a matter of first impression, the Ninth Circuit stated that its holding prevented the imposition of burdensome procedural tasks on a federal agency that would constitute a disincentive for federal agencies to provide informal advice or consultation. *Murrelet I*, 83 F.3d at 1074. Accordingly, Pacific Lumber assisted in ensuring that projects of the nature involved in this case will receive the informal consultation and advice that they require, resulting in greater species protection.

Pacific Lumber's successful defense further promotes species protection by conserving the government's limited resources and ensuring the availability of resources for other projects more in need of oversight. This facilitates the proper allocation of Fish and Wildlife Service resources and the most beneficial focus of the Fish and Wildlife Service's attention. Accordingly, because the Fish and Wildlife Service may utilize the funds "saved" by Pacific Lumber to address projects constituting a greater threat to endangered species, Pacific Lumber enhanced the protection of those species.

Finally, Pacific Lumber contributed to the Endangered Species Act by ensuring greater and more effective compliance with the Act by establishing an easier, more efficient method of communication with the government. No longer must private parties possess apprehension regarding government evaluation of a project. The Ninth Circuit illustrated the argument in holding that under a contrary ruling

> private parties who wanted advice on how to comply with the Endangered Species Act would be loath to contact the USFWS for fear of triggering burdensome bureaucratic procedures. As a result, desirable communications between private entities and federal agencies on how to comply with the ESA would be stifled, and protection of threatened and endangered species would suffer.

Murrelet I, 83 F.3d at 1074-75. Pacific Lumber's successful defense provides instead an incentive encouraging cooperation with the Fish and Wildlife Service in the initial stages of a project to ensure that species are not harmed. In sum, Pacific Lumber substantially contributed to species protection by clarifying the language, intent, and meaning of Endangered Species Act consultations; setting an example of proactive planning that avoids burdensome procedures; and facilitating and encouraging communication with federal agencies.

Moreover, Pacific Lumber's successful defense of its voluntary communication with the Fish and Wildlife Service not only promotes species conservation, it also results in a more efficient Act. The Endangered Species Act protects species more efficiently because the new interpretation encourages private parties to seek environmental advice from the government to prevent harm to protected species. One beneficial effect of the increase in efficiency is the goodwill resulting from cooperation between private parties and the government. Because Pacific Lumber established a new channel of communication, private parties and the government may work together to solve problems. A less burdensome process promotes cooperation and communication among all parties by erasing the barriers that inhibit government consultation and thereby benefits not only the parties, but also protected species.

Accordingly, this Court should grant the writ of certiorari to address the important question of whether Congress intended

courts to encourage defendants such as Pacific Lumber to vigorously defend their actions under the Endangered Species Act through more accessible attorneys' fees.

CONCLUSION

The Ninth Circuit's "double standard" regarding attorneys' fees conflicts with the decisions of the Fifth Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals. The conflict created by this "double standard" creates uncertainty and inconsistency among the circuits. Moreover, the "double standard" applied by the Ninth Circuit in its most recent decision imposes a disincentive for defendants to vigorously defend their actions when they are justified in doing so. Such a disincentive reinforces the pro-plaintiff emphasis present in many courts today, to the detriment of the goals of economic and administrative efficiency.

To restore Congress' mandate of evenhanded application of environmental laws, to ensure that all of Congress' Endangered Species Act goals are served, and to avoid conflict and confusion regarding the appropriate standard under the Endangered Species Act for an award of attorneys' fees to prevailing defendants, this Court should grant the writ of certiorari.

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Respectfully submitted,

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